Supreme Court, U. S.
FILED
OCT 9 1979
MICHAEL RODAK, JR., CLERK

79-576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

RUTH STEPHENS
ROSE INRIG
Petitioners

v.

COLLIER COUNTY BOARD OF COMMISSIONERS
COLLIER COUNTY, FLORIDA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SECOND DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

RUTH STEPHENS and
ROSE INRIG

Petitioners

VS.

COLLIER COUNTY BOARD OF
COMMISSIONERS, COLLIER
COUNTY, FLORIDA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SECOND DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

Petitioner prays that a writ of certiorari be issued to review the judgment of the Second District Court of Appeal of the State of Florida entered December 15, 1978.

OPINIONS BELOW

The opinion of the Second District Court of Appeal of the State of Florida, was entered December 15, 1978 and is attached hereto as Appendix A. The decision is a per curiam affirmance without opinion. The order of the Florida Supreme Court denying petitioners' petition for a writ of certiorari was entered July 11, 1979 and is attached hereto as Appendix B. The trial court opinion of the Circuit Court of the Twentieth Judicial Circuit in and for Collier County was entered April 28, 1978. That decision found the zoning classifications of the Collier County Ordinance #76-30 constitutional.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

Did the Second District Court of Appeal of the State of Florida err in affirming the decision of the trial court?

CONSTITUTIONAL PROVISIONS

The constitutional provisions involved are the Fourteenth Amendment, United States Constitution, Amendment XIV, Section 1 and Article I, Section 2, Florida Constitution.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
U. S. Constitution, Amend. XIV, Section 1.

"All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect

> property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion or physical handicap. Florida Constitution, Article I, Section 2.

STATEMENT OF THE CASE

Although not part of the facts of the case, a short history of the area effected by the zoning ordinance would be helpful.

Fifty years ago the Big Cypress Swamp was virtually untouched. Then in the 1940's, the cypress trees began to be downed and in the 1950's, there was large scale alligator decimination. In the early 1960's, developers began to drain the Swamp to make it marketable.

Then in 1968, the Dade County Port Authority broke ground for a 39-square mile jet-port in southeast Collier County. However, environmentalists were concerned that a jet-port would result in the death of the Everglades National Park. After a

hard fight between proponents of the jet-port and ecologists, plans for the jet-port were halted. The result of this conflict was a new awareness of the vulnerable and sensitive Big Cypress area.

In an effort to protect the Big Cypress area, Congress in 1974 approved a federal purchase act to buy up more than half a million acres in the heart of the Big Cypress for a national preserve. This measure would protect the purchased land from future development and destruction but a problem still remained in protecting the parts of the Swamp still privately owned.

In 1973, before the federal purchasing act, Collier County Zoning allowed the Estate-"E"-Districts construction of up to eight houses per 2.5 acres. The Agricultural-"A"-District allowed sixteen houses per 5 acres. It was under the above liberal

zoning, that thousands of persons purchased Collier property.

Then on June 29, 1976, the Board of Collier County Commissioners adopted zoning ordinance 76-30. Pursuant to this ordinance, the "E" and "A" districts are subject to large lot zoning. In the "E" District the minimum lot area is two and one-quarter (2 1/4) acres. In the "A" District, the minimum lot area is five (5) acres. The result of this large lot zoning is that only one single family dwelling would be permitted on each large lot. These two districts are involved in the instant case.

Proceedings in the Trial Court

Suit was filed in the Circuit Court of Collier County by Ruth L. Stephens as a member of the class of land owners in "A" and "E" Districts. Her Third Amended

Complaint alleged that the zoning in regard to those areas was an overbroad and arbitrary exercise of the police power; that it violated certain Constitutional guarantees; and that it amounted to a taking for the benefit of the general public such that the land owners should be compensated. In the third amended complaint, Plaintiff Ruth L. Stephens was joined by Rose Inrig as representatives of the class of property owners respectively. Because of the large number of persons affected, near 65,000, Plaintiffs moved to maintain a class action. By an Order dated December 2, 1977, the Court certified the class as defined in Plaintiffs complaint and directed that it should be divided into two subclasses consisting of property owners in the "A" District and property owners in the "E" Districts.

On February 9, 1978, a trial was held and thereafter, the Court rendered its verdict finding the zoning classifications of Ordinance 76-30 constitutional.

Proceedings in the Florida District Court of Appeal and Supreme Court

On March 9, 1978, Petitioners appealed the decision of the Circuit Court. On December 15, 1978, the Second District Court of Appeal rendered a per curiam affirmance of the trial court's decision. No opinion was given.

On January 12, 1979, Petitioners filed their petition for a writ of certiorari to the Florida Supreme Court. On July 11, 1979, the Supreme Court denied the petition.

REASONS FOR GRANTING THE WRIT

This case presents the basic question of whether property owners can be denied the right to use their property as they

desire by zoning ordinances enacted by local government.

The power to zone arises from the police power, and ordinances enacted for this purpose must be reasonably related to the public health, safety, morals, and general welfare. Town of Hialeah Gardens v Hebraica Community Center, 309 So. 2d 212, (3rd D.C.A. 1975). Furthermore, in exercising this power, the country may not infringe upon the constitutional guarantees of the State or Nation by invading personal or property rights unnecessarily or unreasonably or by denying due process or equal protection of the laws. Neither may the exercise of this power discriminate unreasonably, arbitrarily or oppressively. Blitch v City of Ocala, 195 So. 406 (Fla. 1940).

The ordinance at issue here, 76-30, is the tool that implements the comprehensive plan as adopted by the County in 1974.

This was at a time when people were becoming aware that areas such as Golden Gate Estates were an attractive place to live.

In response to the threat of haphazard growth, Collier County enacted a zoning ordinance, part of which made the "A" and "E" districts subject to large lot zoning. In the "A" district the minimum lot area is five (5) acres upon which may be built a single family residence with a minimum floor area of 800 square feet. The permanent placement of mobile homes on this land is not permitted. In the "E" district the minimum lot area is two and one quarter (2 1/4) acres and the minimum floor area is 1,000 square feet for a single story residence.

This large lot zoning comprises more than one third (1/3) of the area of Collier County. The effect of this zoning is to decrease the population and to increase the

expense on the part of the homeowner to maintain his lot.

Respondents argue that the present zoning does not discriminate on an economic level. The trust of their argument is that you pay more per acre for small lots than you do for large lots of land. Without a doubt this is just as true with land as with anything else, the more you buy, the better the price. However, the mere fact that the land itself may be somewhat cheaper, where there is large lot zoning does not in and of itself show that no economic discrimination exists. Sure, it would be easier for poor people to afford to buy just the land in such large lots zoning areas. However, once they have this land they cannot live there unless they have a home which has a minimum floor area, provided such a home is not a mobile home; unless they are able to afford the upkeep on such a large lot,

including the municipal services such as water, sewage, and police, which must necessarily be extended over greater area for the same number of persons, and unless he could afford to travel over long distances to his job, his recreational activities, his food markets, hardware stores, drug stores, automobile services, his schools, and so on. These are the points which the Respondent does not address and understandably so.

The Supreme Court has recognized that classification on the basis of race or wealth are highly suspect and therefore subject to exacting judicial scrutiny. McDonald v Board of Election Comm'rs 394 U.S. 820, 807 (1969).

The "rationality test" is often employed to test economic regulation. If the classification drawn by the legislation bears a reasonable relation to a permissible state objective sought to be achieved by the statute, then the classification is not

violative of the equal protection clause. McGowan v. Maryland, 366 U.S. 420, 426 (1961).

In the instant case, common sense coupled with the zoning ordinance, bear out the fact that a wealth classification exists. Present and future, lowcost housing in the "A" and "E" districts is virtually prohibited and excluded. The objectives of the zoning ordinance, which are legitimate police power concerns, do not bear any relation at all to a wealth classification.

Clearly, the ordinance presents defacto discrimination against low and middle income individuals. Accordingly, it violates the equal protection clause of the constitution. U.S. Constitution amend. XIV, §1. Fla. Constitution Art. I, § 2.

This concept, while not new, has no Florida precedent. However, it is well supported in other jurisdictions.

In Southern Alameda Spanish Speaking Organization v. Union City, 424 F. 2d 291 (9th Cir. 1970) a voter referendum nullified a zoning variance that would have allowed the construction of low income housing. The Ninth Circuit Court of Appeals said that regardless of motive, if the result was discriminatory, it violated equal protection.

> "Surely, if the environmental benefits of land use planning are to be enjoyed by a city, and the quality of life of its residents is accordingly to be improved, the poor cannot be excluded from enjoyment of the benefits."

In the instant case, Naples may not have the poverty problems of other urban areas. Certainly, the size and retirement/tourist nature of the community make it less susceptible to problems of poverty and urban decay, but it is not immune. Seasonal traffic congestion might be a force to make some want to move out. Others, may just prefer

suburban life. Whatever the reason, persons wishing to leave the urban area, will have to be able to afford a small country estate. If they can't they must live in the city.

Property owners in "A" and "E" Districts who would like to build and live on their property, will have to absorb the cost of the large lot. Also, they will not be able to minimize the cost of the large lot by rental monies. If the ordinance allowed one trailer per large lot, economic living would be within the means of more, but trailers are even excluded.

Zoning, when used correctly, can be a useful method by which a county may provide for orderly growth in the future. While large lot zoning on a small scale may be fairly debatable, it becomes patently overbroad and arbitrary when applied to such a large area. This particular zoning ordinance as written and as applied not

only does not provide for orderly growth, but in fact denies such growth even in areas where growth is currently feasible. The County can not use zoning ordinances to solve the problems of future growth.

In Appeal of KitMar Builders, Inc. 268 A. 2d 765 (Pa. 1970) the Supreme Court of Pennsylvania struck down a zoning ordinance with minimum lot restrictions of two and three acres. The primary justification for the zoning ordinance was that allowing a higher density would create a potential sewerage problem.

The Court stated that whether such a problem could exist or not was irrelevant,

> " . . . communities must deal with the problems of population growth. They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels."

The 2 1/4 and 5 acre minimum lot sizes have effectively limited the "A" and "E"

Districts' population, to near present levels. The restrictions coupled with the nature of the land will effectively preclude the influx of newcomers into the territory.

Collier speaks of various legitimate police power objectives in regard to the ordinance. However, through this ordinance it was most certainly an objective of the county to put a population cap of sorts on future growth. Their past experience with land developers have left them afraid and cautious. There is a wish to preserve the interior of the state as much as possible from further development. Big Cypress sits atop a shallow acquifer that may need to be tapped for fresh water. Additionally, the county is afraid of possible costs and expanding its services to remote areas.

Regardless of how wellfounded these fears, a population cap through minimum lot zoning is not an acceptable method of

dealing with potential problems of the future.

> "Zoning may not be used to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring." National Land and Investment Company v. East own Township Bd. of Adjustment, 215 A. 2d 597 (PA. 1965).

Florida case law on population caps is young, but it is clearly developing along the line of Pennsylvania case law.

The city of Boca Raton passed a charter amendment specifically limiting the quantity of dwelling units.

The circuit court of Palm Beach County (Fifteenth Judicial Circuit) wrote an opinion in the consolidated cases of Boca Villas Corp. v. E. E. Pence (No. 73 106 CA (L) 01 F) and Keating Meredith Properties, Inc. V. City of Boca Raton (No. 73 540 CA (L) 01 F) decided September 30, 1976.

Questioning the manner in which the specific limitation was arrived at and

enacted, it stated: "Its passage without benefit of professional or scientific study is repugnant to the Court's concept of orderly legislative action." After examining in great detail the "emotional and arbitrary birth" of the population cap, the judge concluded that there "is no real substantial relationship between the cap and the public purpose allegedly protected and preserved by it."

The court went on to hold that the cap's detrimental economic effect on property values outweighs any benefit to the public, that the cap constitutes the establishment of an exclusionary zoning pattern, and that plaintiff's property has been confiscated by virtue of their being unable to make "present allowable use of the property."

Comparing Boca Villas to the instant case reveals similarities on every point.

The adoption of ordinance 76-30 was surrounded by sketchy professional and scientific study. If specific data was presented for the board's consideration, it is not apparent in the record.

The Collier population cap bears no reasonable relation to the objectives of this ordinance.

The large lot zoning has had a detrimental effect on property value. Generally, the reason behind large lot zoning is to maintain property values. The cap constitutes an exclusionary zoning pattern, and the Petitioners' property has been effectively confiscated.

In addition to violating equal protection and exceeding the police power, Ordinance 76-30 is unduly confiscatory and the property owners should be compensated. As Justice Holmes recognized, "While property may be regulated to a certain extent, if

regulation goes too far it will be recognized as a taking." Pennsylvania Coal Company V. Mahon, et. al, 260 U.S. 393, at 415 (1922). He went on further to warn, "We are in danger of forgetting that a strong public desire to improve the public conditions is not enough to warrant achieving a desire by a short cut than by a constitutional way of paying for the change." Supra at 416.

Respondent's argument that " . . . in fact, the actual value of the property may have been raised by this zoning." is not supported by any evidence. Actually the evidence showed clearly that most of the property affected has been drastically reduced in value. This was clear from the evidence that the tax assessments have been generally reduced.

Moreover, the evidence was clear that no market exists for most of the property

in question since the subject ordinance was enacted.

Local zoning traditionally imposes use restrictions to prevent harm to property within a particular neighborhood or community.

Environmental controls, on the other hand, generally impose use restrictions to create a public benefit of regional or statewide impact. Rather than protecting the values of the adjacent neighborhood or community, broad environmental restrictions often reduce the value of the property. Dooley V. Town Plan and Zoning Comm'n, 197 A. 2d 770 (Conn. 1964).

The Supreme Court of Maine and several other courts have squarely countered the inequity of land use restrictions creating regional and statewide benefits without compensation.

In State V. Johnson 265 A. 2d 711 (ME. 1970) the defendant proposed to fill

his land which the state deemed a valuable natural resource. The court held that cost of its preservation should be publicly borne.

Also, the Respondent totally disregards the point that the primary benefit arising from such zoning accrues to the citizens of Collier County and the State of Florida.

The Big Cypress Swamp covers most all of Collier County, particulary the "E" and "A" Districts. The federal government has determined that the preservation of the Big Cypress is a public necessity, and so it is purchasing much of the land. The state of Florida has designated Big Cypress as an area of critical state concern, "having a significant impact upon environmental and natural resources of regional and statewide importance." See FS. 380. 055 (2). It has pledged money to help acquire the National preserve.

Florida Statutes Chapter 380 is to be implemented by local government, like the

Collier County Board of Commissioners. However, Chapter 380 specifically denies authorization of local government to adopt regulations unduly restrictive or constituting a taking under the constitutions of the state or of the United States.

In direct violation of the constitutions and Chapter 380, Collier County has adopted Ordinance 76-30, sections 37, 38. These provisions are unduly restrictive. They are meant to preserve and maintain the Big Cypress in its natural state for the benefit of the region, state and nation, and constitute a taking under the state and federal constitutions.

The case law today regarding land use controls and constitutional prohibitions on the taking of property without compensation is at best unclear.

One Florida commentator has expressed it as follows:

> "Existing landuse case law generally involves a review of local zoning enactments. Such cases form an unfathomable web of dicta, rhetoric and standards which are meaningless in their applications."

Although the case law provides no useful generalized standards to aid in the determination of when a taking occurs, it does provide some indication of certain specific factual limits beyond which land-use regulation may not be valid. These specific limits may be helpful in viewing the instant case.

Florida's courts have held that prohibiting the filling of privately owned submerged lands, absent positive proof of overriding necessity, may amount to a taking without just compensation. Zabel v. Pinellas County Water and Navigation Control Authority, 171 So. 2d 376 (Fla. 1965); Askew v. Taylor, 229 So. 2d 72 (Fla. 1st DCA 1974).

In both Zabel and Taylor, the courts held that if the local legislature was so concerned with the ecological integrity of the land in questions, it could condemn the land and purchase it for public benefit.

The need to protect Big Cypress and Collier County in the face of continued population growth and development is uncontroverted. However, compelling particular landowners to withstand inordinate restrictions for the benefit of an entire county is clearly unjust and contrary to our democracy.

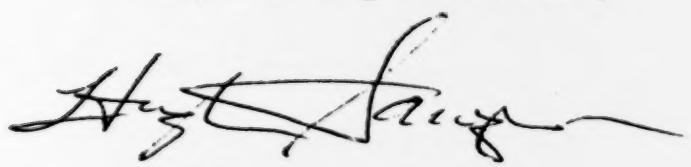
Unless the Court grants the writ, close to 65,000 innocent landowners will be injured by an ordinance that is grossly overbroad, arbitrary and unconstitutional. If the County and the State of Florida want to preserve the Big Cypress area, they can compensate the landowners for their property. If zoning such as this

is allowed, anytime government wants to preserve an area, they will only have to change the zoning. In that way, they can accomplish their objective without compensating those people who are injured. Such broad use of the police power should not be allowed.

CONCLUSION

The Second District Court of Appeal erred in affirming the decision of the trial court and the Supreme Court of Florida erred in not granting a writ of certiorari. The petition for a writ of certiorari should be granted.

Respectfully submitted,



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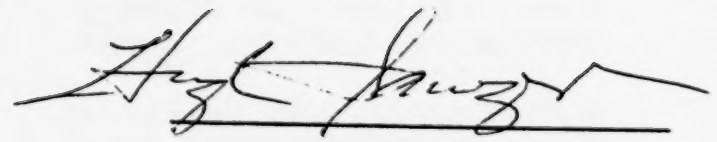
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Anthony P. Pierce, Jr., Assistant Collier County Attorney, County Courthouse Complex, Naples, Florida 33942, this 5th day of October, 1979.



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APPENDIX A

IN THE DISTRICT COURT

OF APPEAL OF FLORIDA

SECOND DISTRICT

RUTH L. STEPHENS and
ROSE INRIG.

Appellants,

v. Case No. 78-395

COLLIER COUNTY BOARD OF
COMMISSIONERS, COLLIER
COUNTY, FLORIDA,

Appellee.

Opinion filed December 15, 1978.

Appeal from the Circuit
Court for Collier County;
Charles T. Carlton, Judge.

Hugh Sawyer, St. Petersburg,
for Appellants.

Donald A. Pickworth, County
Attorney, Ronald C. Dillon
and James H. Siesky, Assistant
County Attorneys, Naples,
for Appellee.

PER CURIAM.

Affirmed.

HOBSON, A.C.J., and BOARDMAN and RYDER,
J. J., Concur.

APPENDIX B

SUPREME COURT OF FLORIDA

WEDNESDAY, JULY 11, 1979

RUTH L. STEPHENS, ET AL.,

Petitioners,

vs. CASE NO. 55,921

District Court of Appeal,
Second District

78-395

COLLIER COUNTY BOARD OF
COMMISSIONERS, COLLIER
COUNTY, FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R. App. P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

BOYD, ACTING C.J., OVERTON, SUNDBERG,
HATCHETT and ALDERMAN, JJ., Concur

APPENDIX C

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR COLLIER COUNTY, FLORIDA.

CASE NO. 76-1161-CA-01-CTC

RUTH L. STEPHENS,

Plaintiff,

v.

COLLIER COUNTY BOARD OF COMMISSIONERS, COLLIER COUNTY, FLORIDA

Defendants.

ORDER

THIS CAUSE having come on for trial on February 9, 1978, the Court makes the following findings of fact:

1. The "A" and "E" zoning districts of Ordinance 76-30 are not exclusionary and do not create a de facto discrimination against low and middle income persons thereby preventing them from using suburban and rural low-cost housing.

2. The "A" and "E" zoning classifications of Ordinance 76-30 are not designed solely to limit population.

3. The topographic and physical characteristics of the areas encompassed by "A" and "E" zoning are not such are to make it economically impossible to develop the land and do not constitute a taking.

4. "A" and "E" zoning classifications of Ordinance 76-30 are not unreasonable restrictions and are within the police power of Collier County, Florida.

5. The "A" and "E" zoning districts of Ordinance 76-30 are not designed solely as environmental controls creating a public benefit.

6. Ordinance 76-30 is not arbitrary or capricious and it is reasonable.

7. There is a general lack of municipal services in the areas encompassed by "A" and "E" zoning and there are possible health hazards in those areas due to septic tanks polluting the aquifer which serves as the drinking water source for most of Collier County.

8. Ordinance 76-30 was designed to maintain a rural atmosphere presently existing in the areas encompassed by "A" and "E" zoning.

9. Plaintiff has failed to meet its burden of proof.

IT IS THEREFORE ORDERED AND ADJUDGED that the "A" and "E" zoning classifications of Ordinance 76-30 are constitutional; that Plaintiffs take nothing by this action and that Defendant, Collier County, go hence without day.

ORDERED at Collier County Collier County, Florida, in open court, on February 10, 1978.

Dated: Apr 28, 1978

/s/
CHARLES T. CARLTON
CIRCUIT JUDGE